45 Endorsed: No. 16198. Supreme Court. In re J. H. Williams. Petitioner, Answer of Petitioner to return to Writ. Filed Nov. 5, 1908. D. A. Valentine, Clerk Supreme Court Dan'l B. Holmes, Chas. Blood Smith, Attorneys for Petitioner.

46 And also on the same day, to-wit, Thursday the 5th day of November, 1908, the same being one of the regular judicial days of the July 1908 term of the Supreme Court of the State of Kansas said Court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record at page thirty-seven of Journal "MM" of said court in words and figures as follows, to-wit:

47 In the Supreme Court of the State of Kansas, Thursday, November 5, 1908.

No. 16198.

In re J. H. WILLIAMS.

Journal Entry of Submission.

This proceeding comes on to be heard on the Writ of Habeas Corpus, the return thereto, and the answer to the return, and thereupon said Proceeding is *submitted* on brief of counsel for both parties and taken under advisement by the court.

48 And afterwards to-wit on Saturday the 12th day of December, 1908 the same being one of the regular judicial days of the July 1908 term of the Supreme Court of the State of Kansas, said Court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record at page 126 of Journal "MM" in the words and figures as follows, to-wit:

49 In the Supreme Court of the State of Kansas, Saturday, Dec. 12th, 1908.

No. 16198.

In re J. H. WILLIAMS.

Journal Entry of Decision.

This cause comes on for decision and thereupon it is ordered and adjudged that judgment herein be entered in favor of the respondant and against the petitioner.

It is further ordered that the petitioner be remanded into the custody of J. E. Walsh, sheriff of Crawford County, State of Kansas, there to remain pending any further proceedings concerning him.

It is further ordered that the petitioner pay the costs of this Proceeding taxed at $— and hereof let execution issue.

50 And also on the same day to-wit Saturday the 12th day of December, 1908, there was filed in the office of the Clerk of the Supreme Court the Syllabus and Opinion of said Court in this cause, which Syllabus and Opinion are in words and figures as follows, to-wit:

51 No. 16198.

In re J. H. WILLIAMS.

Original Proceedings in Habeas Corpus.

Petitioner Remanded.

Syllabus by the Court.

Benson, J.

Chapter 250 of the Laws of 1907, entitled, "An Act to protect mines, miners, and mine laborers, and defining the manner of sale and delivery of black powder for use in coal-mines of the state of Kansas," is not in conflict with the state constitution, or the fourteenth amendment to the constitution of the United States, and is not invalid as a regulation of interstate commerce.

All the justices concurring.

A true copy.

Attest:

——— ———,

Clerk Supreme Court.

52 *Statement.*

The petitioner was convicted for selling to a coal miner employed in a mine at the Central Coal and Coke Company a quantity of black powder, to be used in the mine, which was not in an original package containing 12½ pounds, securely sealed, in violation of chapter 250 of the Laws of 1907, which provides:

"It shall be unlawful for any individual, firm or corporation to sell, offer for sale or deliver for use at any coal-mine or mines in the state of Kansas, black powder in any manner except in original packages containing twelve and one-half pounds of powder, said package to be securely sealed; said powder to be delivered by the company to the miner at its powder-house, not more than three hundred feet from pit head, unless hereafter otherwise provided by contract; provided, however, this act shall not be construed as in any manner conflicting with any existing contract of sale of black powder."

He was fined $50.00 for this offense as provided in section 5 of the act and committed to jail for failure to pay such fine. He thereupon sued out this writ of habeas corpus. The return sets out the

complaint, warrant, judgment of the court, and commitment thereunder. The petitioner bases his right to release upon the alleged unconstitutionality of the act, and this is the only question presented.

It is contended that the act violates the bill of rights in the state constitution and the 14th amendment to the federal constitution by restricting the liberty of contract by taking property without due process of law, by denying the equal protection of the laws and by unlawful discrimination. It is said that the petitioner's right to contract with reference to his labor and the means of labor is materially abridged by the conditions prescribed in this act, and that such abridgement is in violation of the guarantees of the instruments referred to. Counsel say that:

53 "The miner himself would not have a right to bargain away his life, liberty and pursuit of happiness. These rights are inalienable. They are no more alienable by the miner than by those who, for the purpose of introducing the panacea of State guardianship and the extinction of individual rights, pay him the high compliment of saying that he shall be classed with infants, idiots and persons of non-sane memory, and that he does not possess sufficient capacity or intelligence to make his own contracts, or to look after his own best interests in a lawful and beneficial employment."

It is further insisted that the act is in conflict with section 17 of Article II of the constitution which provides that all laws of a general nature shall have uniform operation, and that no special law shall be enacted where a general law can be made applicable; and finally it is claimed that the act is void because in conflict with the co-called commerce clause of the federal constitution.

It was stipulated upon the trial in this court, that, among other things, the powder so sold by the defendant was in an unbroken original package containing 25 pounds imported from the state of Missouri by the company for which defendant was the agent; that black powder is an article of commerce among the states; and that black powder in 12½ pound packages cannot be bought or sold in the market except at a considerably higher price, but the fact that it was so imported from Missouri (and that 12½ pound packages would be more expensive) was not shown at the trial upon the complaint before the justice.

54 The opinion of the court was delivered by

BENSON, *J.*: Laws regulating the operation of coal mines have been in force in this state since the year 1875. In that year a statute was enacted requiring the construction of escapement shafts, guarding against the obstruction of air ways, and otherwise providing for the safety of employees. (Laws 1875, Chap. 115.) In 1883, an act was passed to better promote the same purposes with more comprehensive regulations, requiring also the guarding of machinery, making provisions for safety appliances and for the inspection of coal mines. (Laws 1883, chap. 117.) This act was amended in 1885 and the following provision was added:

"No miner, workman or other person shall take into any mine

more than five pounds of powder at one time, and this shall be used before taking any more into the mine; and all powder or other explosive substance shall be kept in a close, tight vessel." (Laws 1885, chap. 143, sec. 2.)

Another act was passed in 1889 "To provide for the protection of life and property in and about coal mines." (Laws 1889, chap. 172.) This act required the employment of "shot-firers" and provided regulations for shot firing.

The following section was enacted in 1891:

"It shall be unlawful for any miner or other person to take into or have in his possession in any coal-mine shaft, slope, or pit, in this state, more than twelve and one-half (12-½) pounds of powder or any other explosive substance at any one time; and all such powder or other explosive substance shall be kept in a tight box securely locked, and such boxes shall be kept at least twenty yards from the working-face in all such coal-mine slopes, drifts, or pits; and it shall be the duty of all pit-bosses or other persons who shall be in charge and control of any coal-mine slope, drift or pit in this state, to keep watch over and see that the provisions of this act are complied with, and any person violating or neglecting to comply with the provisions of this act shall be deemed guilty of a misdemeanor, and shall, on conviction before any court having jurisdiction thereof, be fined in any sum not less than ten nor more than fifty dollars, or by imprisonment in the county jail not more than thirty days, for each and every such offense; and the possession of more than twelve and one-half pounds of powder, or any other explosive substance, in such coal-mine slope, or drift, shall be *prima facie* evidence of the person taking said powder, or other explosive substance, into such mine, slope, or drift." (Laws 1891, chap. 147, sec. 1.)

These various statutes, and some others relating to the same subject, will be found in the general statutes of 1901, sections 4109 to 4174 inclusive—and clearly indicate the policy of the state to provide for safety in the operation of coal mines, as a distinct subject of legislation. It will be observed also that this legislation has been progressive, provisions for safeguards having been added from time to time. In 1885 the first regulation was made concerning the use of explosives, limiting the quantity to be taken into the mine at one time to five pounds of powder or other explosives. In 1891, the quantity was increased to 12½ pounds, and additional precautions were provided. In the act of 1907, now under consideration, a specific regulation was made concerning black powder alone. Thus it appears that the legislature for many years has deemed it wise to restrict the use of explosives in coal mines and adopted this specific regulation as part of the law on that subject.

If this last act is void because it relates to coal mines alone, and because it does not refer to lead, zinc, and other mines and quarries, as counsel contend, then for the same reason the other regulations contained in the statutes referred to must fall with it, for all are restricted to the one subject. That a law operates only upon a class does not make it invalid if the classification is reasonable. If the

classification is arbitrary or fictitious it is objectionable.
56 but where it is based upon such differences in situation as to be reasonable in view of the purpose to be accomplished and tends fairly to accomplish that purpose, it must be upheld. (Rambo v. Larrabee, 67 Kan. 634.) It is sufficient if the classification is based upon some reasonable ground—some differences which bear a just and proper relation to the attempted classification and is not a mere arbitrary selection. (Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283.)

The coal mining industry of the state is of great and growing importance, about 12000 men are employed in this corporation in this state. The hazards incident to this work are matters of common knowledge and proper regulations to secure the safety of employees, so far as possible, is a matter appealing strongly to the wisdom and conscience of the legislature. Regulations to promote this beneficent end are not void because they do not relate to other industries, where, if the peril is as great, the conditions at least are different, and may propertly call for different regulations.

It is also contended that the act is void because the restrictions are upon black powder alone. This article appears to be in common use in coal mining in this country (International Library of Technology, subject: Explosives and Blasting, secs. 9 to 16.), and we may presume that this was the reason for legislative action upon it. The important question however relates to the power of the legislature to act rather than the reason for its action.

Speaking generally laws may be enacted to promote the health and safety of the people, and will be upheld when they have a necessary or reasonable relation to the accomplishment of such ends. Mr. Justice Harlan in delivering the opinion of the court, in a case involving the validity of a statute regulating the inspection of oils, said:

"It (the Supreme Court) has, nevertheless, with marked distinctness, and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police
57 regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property, which each State owes to her citizens."
(Patterson v. Kentucky, 97 U. S. 501, 506.)

This language was quoted with approval in Mugler v. Kansas, 123 U. S. 623, 666.

In another case the same court said:

"But the clause (of the 14th Amendment) does not limit, nor was it designed to limit, the subjects upon which the police power of the state may be exerted. The state can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity. And to accomplish this end special legislation must be resorted to in numerous cases, providing against accidents, disease and danger, in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment

of the legislature as to the security needed by society. When the calling, profession or business of parties is unattended with danger to others, little legislation will be necessary respecting it. Thus, in the purchase and sale of most articles of general use, persons may be left to exercise their own good sense and judgment; but when the calling or profession or business is attended with danger, or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise. Thus, if one is engaged in the manufacture or sale of explosive or inflammable articles, or in the preparation or sale of medicinal drugs, legislation, for the security of society, may prescribe the terms on which he will be permitted to carry on the business, and the liabilities he will incur from neglect of them." (Minneapolis Railway Co. v. Beckwith, 129 U. S. 26, 29.)

Mr. Justice Gray in Leisy v. Hardin, 135 U. S. 100, 128, declared:

58 "The police power extends not only to things intrinsically dangerous to the public health, such as infected rags or diseased meat, but to things which, when used in a lawful manner, are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the life, the health or the morals of the people. Gunpowder, for instance, is a subject of commerce and of lawful use, yet, because of its explosive and dangerous quality, all admit that the state may regulate its keeping and sale."

While this quotation is from a dissenting opinion it is believed to be the statement of a proposition everywhere conceded to be true. Indeed the power of legislation to regulate the use and sale of dangerous explosive and highly inflammable substances has been so widely exercised and so generally upheld that authorities are unnecessary.

An objection is made to this act because it requires that each can shall contain neither more nor less than 12½ pounds. The sale in this case was of 25 pounds so that the effect of a sale of a lesser quantity is not directly presented. The law however can not be held invalid for the reason suggested. The legislative power to restrict the sale to not more than the given quantity is not insufficient to declare that it shall not be less. A dangerous substance is to be introduced into a mine. Safeguards are provided to reduce the danger to the smallest possible degree consistent with the proper execution of the work; the legislature has determined that 12½ pounds in a can securely sealed is the quantity that will best promote the greatest safety, at the least expense and inconvenience and so best calculated to accomplish the intended purpose. It is not perceived how the court can say that it will not do this. Conceding the power to regulate, the wisdom of the regulation, unless clearly arbitrary or oppressive, must be upheld if it can be seen that it may have that effect.

The provision requiring the can to be returned complete before another is taken, was probably designed to prevent the fur-

59 ther use of a receptacle that might not be properly sealed, and does not appear to be unreasonable. Its observance will

manifestly tend to safety, which is the obvious purpose of the law. That the package should be an original one may have been required for the reason that such package would probably be better secured than would be done by repacking, thus obviating the risk of imperfect work by inexperienced hands. This and other regulations not specifically referred to here evince the legislative intent to promote safety in a hazardous business. The lives of the miners are of such deep concern to the state as to justify restrictions which, if only inconvenient or even burdensome, are valid if suited to promote this benign purpose.

It is objected that these restrictions unlawfully interfere with the right of contract and that the exception in the act concerning contracts previously made is an unlawful discrimination. If there is however a substantial connection between the purpose of the enactment and the regulations imposed, and the latter tend to the accomplishment of the object assumed, the fact that they do to some extent restrict the power to make contracts, does not make them invalid. (8 Cyc. 864; 22 Am. & Eng. Encyc. of Law, 938.) The usual police regulations concerning fire limits, regulations for the storage of gunpowder, for the sale of poisons, laws concerning oleomargarine, intoxicating liquor, and a multitude of other enactments are of this nature. The laws of Congress relative to meat inspection and the pure food laws are recent illustrations of legislation of this character. All these rest upon the police power which can not be abridged by private contract, and in the exercise of which mere private inconvenience must yield to public welfare.

"It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution, yet it is equally well
60 settled that this liberty is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power of contract. Without stopping to discuss at length the extent to which a State may act in this respect, we refer to the following cases in which the question has been considered: Allgeyer v. Louisiana, 165 U. S. 578; Holden v. Hardy, 169 U. S. 366; Lochner v. New York, 198 U. S. 45." (Muller v. Oregon, 208 U. S. 412, 421.)

This language is that of Mr. Justice Brewer, holding that a law regulating the hours of labor for women in factories etc., which was vigorously attacked because it restricted the right to contract in respect to their own labor, was valid. In Holden v. Hardy, 169 U. S. 366, a law regulating employment of workingmen in coal mines, assailed upon the same ground, was sustained. The court said:

"This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health

of employés as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases — Davidson v. New Orleans, 96 U. S. 97, and Yick Wo v. Hopkins, 118 U. S. 356, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.' Lawton v. Steele, 152 U. S. 133, 136" (page 391).

61 The final claim of the petitioner that the act is in violation of the commerce clause of the Federal Constitution may not be presented in this record since the fact of the importation of the package from Missouri did not appear at the trial before the justice. Our views upon this question, however, will be briefly given. The control of interstate commerce committed to Congress does not prevent the state from making reasonable regulations designed primarily to promote the health and safety of its people, although they indirectly affect the subjects of interstate commerce. The police power still remains with the states, and although it is difficult sometimes to trace the line where the legitimate exercise of such power ends with reference to a particular subject and that of congress begins, we believe that this particular law is safely within the recognized limits of state legislation: The Supreme Court of the United States has quite recently stated the rule in a case involving the cattle inspection laws of this state, thus:

"But though it may not legislate for the direct control of interstate commerce, the State may exercise any part of the legislative power which was not withdrawn from it expressly or by implication by the scheme of government put into operation by the Federal Constitution. It may sometimes happen that a law passed in pursuance of the acknowledged power of the State will have an indirect effect upon interstate commerce. Such a law, though it is essential to its validity that authority be found in a governmental power entirely distinct from the power to regulate interstate commerce, may reach and indirectly control that subject." (Asbell v. Kansas, 209 U. S. 251, 254.)

The same court in a case involving the validity of a statute restricting the sale of cigarettes said:

"We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that, if the action of the state legislature were a *bona fide* exercise of its police power, and dictated by a genuine regard

62 for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce."

* * * * * * *

We are therefore of opinion that although the State of Tennessee may not wholly interdict commerce in cigarettes it is not, in

the language of Chief Justice Taney in the License Cases, 'bound to furnish a market for *it,* (them) nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the General Government" (Austin v. Tennessee, 179 U. S. 343, 349, 350).

This principle was affirmed in Plumley v. Massachusetts, 155 U. S. 461, in a case relating to the manufacture and sale of imitation butter. The court adopting the language of an earlier case said:

" 'In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. * * * And it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only directly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.' " (Page 473.)

It will be noticed that the court in the opinion last cited, also referred to and distinguished Leisy v. Hardin, *supra*, cited and relied upon by the petitioner.

63 Many other authorities, state and federal, to the same import might be cited, but the foregoing are sufficient to indicate the views of the tribunal whose decisions must be accepted as final upon this question.

We do not find the act in question to be in conflict with the state or federal constitution.

The petitioner is remanded.

All the justices concurring.

A true copy.
Attest:

____ _ ___,
Clerk Supreme Court.

64 And afterwards and on Wednesday, the 30th day of December, 1908, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas a Petition for a re-hearing of this cause, which petition for a re-hearing together with the endorsements thereon is in words and figures as follows, to-wit:

65 In the Supreme Court of the State of Kansas.

No. 16198.

In re J. H. WILLIAMS, Petitioner, for Writ of Habeas Corpus.

To the Honorable the Justices of the Supreme Court of the State of Kansas:

Comes now J. H. Williams, petitioner herein, and moves the Court for a rehearing of the above-entitled cause, for the following reasons, to-wit:

I.

That this Court has overlooked the proposition contended for by this petitioner that the so-called Black Powder Act (Chapter 250 of the Laws of Kansas of 1907) is in contravention of the Fourteenth Amendment to the Constitution of the United States, for the reason that under the terms of the aforesaid Act it is a criminal offense punishable by fine for a person to sell black powder for use in a coal mine in packages other than twelve and one-half pounds, though the vendor may not be aware of the intention of the purchaser to use such powder in a coal mine in the State of Kansas.

It would seem to be clearly a case wherein the seller of black powder is subject to punishment in the way of fine or imprisonment without due process of law. The Act presupposes a knowledge on the part of such vendor of the purpose for which this powder is sold; that the powder may be used for other purposes and that the seller is not in every instance informed of the purpose for which the purchaser is buying it is only too obvious.

The proposition here contended for was recognized and decided in the case of Liquor Company v. Platt, 148 Federal, 894. In this case an Act of West Virginia, providing for the regulation of the shipment and sale of intoxicating liquors was construed. It was provided in that Act among other things that any agent or em-

66 ployé of a common carrier who delivered a package containing intoxicating liquors except to a person having a State license to sell the same or to the bona fide consignee thereof, who had in good faith ordered liquor for his own use, should be deemed to have made a sale in violation of the law and would be subject to a criminal prosecution. It was held that in so far as the Act attempted to impose a criminal liability upon such carrier or its agent by reason of the delivery of liquors handled in the ordinary course of its business, it was unconstitutional and void as depriving the carrier and its agents of their liberty and property without due process of law, and denying to them the equal protection of the laws. On page 902 in the opinion, Goff, Circuit Judge, says:

"And when said statute endeavors to subject the Common carrier and its agents to penalties in connection with the delivery of liquors to persons who may not be bona fide consignees, such carrier and such agents having no knowledge and no opportunity to obtain information of the unlawful intent of the consignee, it is void, because it

not only interferes with the attempts to regulate interstate commerce, but it also deprives the carrier and its agents of their liberty and of their property without due process of law, and denies them the equal protection of the laws."

In the case of Horwich v. Laboratory Company, 68 N. E. (Ill.) 938, it was held:

"Act May 11, 1901 (Hurd's Rev. Stat. 1901, p. 1793) sec. 3, providing that the fact that boxes, bottles, etc., bearing registered marks of the owners, shall be found in the possession of junk dealers, or dealers in cans, boxes, bottles, etc., shall be prima facie evidence of unlawful possession, within the meaning of the act, is unconstitutional, as it authorizes a conviction of such dealers on evidence that would not warrant the conviction of other persons."

Scott, Justice, after stating the substance of the third section of the Act, on page 942 of the opinion, says:

"Such possession by others is given no such effect by this statute. Dealers of the kind mentioned in the quoted language are merchants. An empty pasteboard shoe box found in the residence of one whose business is the manufacture and sale of tubs, casks, kegs, and barrels, bearing a registered mark, would be prima facie evidence that he had violated this law, and if he were unable to explain his possession would warrant his conviction, while if the same box bearing the same mark, were found in the residence of his next-door neighbor, who is a grocer, it would be no evidence at all of any violation of this statute. This is an unlawful discrimination against persons dealing in receptacles of the specified class, and confers a special privilege or immunity upon all other persons. It makes that evidence against one which is not evidence against another. The Legislature is without power to make any such arbitrary distinction. In the case of Mathews v. People, 202 Ill. 389, 67 N. E. 28, the following language from Cooley on Constitutional Limitations is quoted with approval (page 402, 202 Ill., and page 33, 67 N. E.): 'A statute would not be constitutional * * * which should select particular individuals from a class or locality and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. * * * Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments.' The same doctrine is announced in Millett v. People, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869; Harding v. People, 160 Ill. 459, 43 N. E. 624, 32 L. R. A. 445. 52 Am. St. Rep. 344, and Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176. We therefore conclude that in making it possible to convict junk dealers, and dealers in receptacles of the class mentioned in the statute, on evidence that would not warrant the conviction of other persons, the Legislature has made an unwarranted and unconstitutional distinction between such dealers and other persons."

67

II.

That this Court has not considered, as is indicated by the failure of the Court to refer thereto in its opinion handed down in this cause, the contention of this petitioner that Chapter 250 of the Laws of Kansas of 1907, is void for the reason that it is in contravention of Section 17, Article 2 of the Constitution of the State of Kansas as amended in the year 1906. Your petitioner respectfully refers the Court to pages 54 and 56 of his printed brief filed herein.

III.

That this Court has not given consideration to the following proviso contained in section one of Chapter 250 of the Laws of 1907, to-wit: "Provided, however, that this act shall not be considered as in any manner conflicting with any existing contract of sale of black powder."

That your petitioner urges that the exception here made is an unreasonable discrimination and therefore repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States. Your petitioner respectfully calls the attention of the Court to the argument contained on pages 46, 47, 56 and 57 in his printed brief filed herein.

68 For the above reasons, it is submitted that a rehearing should be granted in this case.

All of which is respectfully submitted.

DAN'L B. HOLMES,
CHAS. BLOOD SMITH,
Attorneys for Petitioner.

Endorsed: No. 16,198. State Supreme Court. In re J. H. Williams, Petitioner. Petition for Rehearing. Filed Dec. 30, 1908, D. A. Valentine, Clerk Supreme Court. Rossington & Smith, Rooms No. 18, 20, 22, 23 and 24, Crawford Building, Topeka, Kansas, Attorneys for Petitioner.

69 Be it further remembered that afterwards and on Wednesday the 14th day of April, 1909, the same being one of the regular judicial days of the January 1909 term of the Supreme Court of the State of Kansas, said Court being in session at it- court room in the City of Topeka the following proceedings among others was had and remains of record at page 421 of Journal "MM" in words and figures as follows, to-wit:

70 In the Supreme Court of the State of Kansas, Wednesday, April 14, 1909.

No. 16198.

In re J. H. WILLIAMS.

J. E. Denying Re-hearing.

Now comes on for decision the petition for a re-hearing of this cause; thereupon it is ordered and adjudged that said petition for a rehearing be denied.

71 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of in the matter of the Application of J. H. Williams for the writ of Habeas Corpus, and also of the syllabus and opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas, this June 9th, 1909.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

72 Here follows the Petition for the Writ of Error; The Order of Chief Justice Johnston allowing the same and fixing a Bond for Appeal at $1,000 00, The Writ of Error, a copy of the Appeal and Supersedeas Bond, together with the approval thereof, assignments of error and the citation, together with the acknowledgment of service thereof by the attorney of record for the Respondant.

73 UNITED STATES OF AMERICA:

In re J. H. WILLIAMS.

Your Petitioner, J. H. Williams, respectfully shows that on the 12th day of December, A. D., 1908, the Supreme Court of the State of Kansas rendered a judgment against your petitioner in a certain proceeding in said Court, wherein your petitioner applied to said Court for a Writ of Habeas Corpus to be discharged from confinement in the county jail of Crawford County, State of Kansas, and from the custody of the Sheriff of said County.

That in said judgment and proceeding there was presented for adjudication by said Court as to the force, meaning and effect of

certain legislation of the State of Kansas affecting the right of your petition-, and which your petitioner claimed to be in violation of the provisions of the Constitution and Laws of the United States as set forth in and by the pleadings filed by your petitioner in said proceeding and fully presented upon the record thereof, and which were decided by the said Supreme Court of Kansas against the contention of your petitioner and against his rights under the Constitution and laws of the United States in the premises.

A full statement of said contention as made and the errors committed by the said Supreme Court of Kansas are contained in the Assignment of Errors filed herewith by your petitioner.

Your petitioner therefore presents herewith an exemplified transcript of the record of the said Supreme Court of the State of Kansas in said cause and proceeding and prays that a Writ of Error to said Supreme Court be allowed; that said Citation be granted and signed;
that the Bond herewith presented be approved that the same
74 may operate as a supersedeas, and that said Bond and Writ
of Error may operate as a supersedeas; that the judgment of said Supreme Court of the State of Kansas be reviewed by the Supreme Court of the United States and the judgment of said Supreme Court of Kansas be reversed and set aside and your petitioner discharged.

J. H. WILLIAMS,
By D. B. HOLMES &
CHAS. BLOOD SMITH, *His Att'ys.*

75 [Endorsed:] In re J. H. Williams. Petition Writ of Error. Filed Jun- 5, 1909. D. A. Valentine, Clerk Supreme Court. D. B. Holes & Chas. Blood Smith, Topeka, Kansas, Attorneys for Petitioner.

76 In the Supreme Court of the United States.

In re J. H. WILLIAMS, Petitioner.

Upon consideration of the petition of the Petitioner, J. H. Williams, in the above-entitled cause, the Court does allow the Writ of Error prayed for therein upon the said Petitioner, J. H. Williams, giving a bond according to law in the sum of One Thousand Dollars ($1,000.00).

W. A. JOHNSTON,
Chief Justice, Supreme Court, State of Kansas.

77 [Endorsed:] Filed Jun- 5, 1909. D. A. Valentine, Clerk Supreme Court.

78 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Justices of the Supreme Court of the State of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of Kansas,

before you, being the highest Court of law and equity in said State in which a decision could be had in said suit or proceedings wherein said J. H. Williams was the petitioner and wherein a right, privilege and immunity were and are claimed under the Constitution and Statutes of the United States, and the decision was against the right, privilege and immunity claimed thereunder a manifest error hath happened, to the great damage of the said J. H. Williams, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at Washington, and filed in the office of Clerk of the Supreme Court of the United States, at Washington, on or before the — day of — 190–, to the end that the record and proceedings aforesaid being inspected, said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 5th day of June in the year of our Lord one thousand nine hundred and nine.

Issued at office in the City of Topeka with the seal of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT,
Clerk Circuit Court United States, First Division of the Judicial District of Kansas.

Allowed this 5th day of June 1909.
W. A. JOHNSTON,
Chief Justice.

79 [Endorsed:] No. —. United States Circuit Court, First Division of the Judicial District of Kansas. Writ of error to the Supreme Court of Kansas. Filed Jun- 5, 1909. D. A. Valentine, Clerk Supreme Court.

Return to Writ.

UNITED STATES OF AMERICA,
First Division of the Judicial District of Kansas, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Topeka this — day of —— A. D. 190–.

——— ———,
Clerk of Said Court.

80 In the Supreme Court of the State of Kansas.

No. 16198.

In re J. H. WILLIAMS.

Know all men by these presents, That we, J. H. Williams, as principal, and the Commerce Trust Company, as surety, are held and firmly bound unto the State of Kansas in the sum of one thousand dollars ($1,000.00), to which payment well and truly to be made we bind ourselves jointly and severally, and all and each of our heirs, successors, executors and administrators, firmly by these presents.

Sealed with our seals this 2nd day of June, A. D. 1909.

Whereas, The above named J. H. Williams has prosecuted a Writ of Error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of the State of Kansas, rendered against him in the above-entitled proceeding,

Now, therefore, The condition of this obligation is such that if the above named J. H. Williams shall prosecute his said Writ of Error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

J. H. WILLIAMS.
COMMERCE TRUST COMPANY.
[SEAL.] By W. S. KEMPER, *President.*
Attest: H. C. SCHINTZZERLIN, *Secretary.*

Approved:
W. A. JOHNSTON,
Chief Justice.

81 In the Supreme Court of the United States.

In re J. H. WILLIAMS.

Assignment of Errors.

Comes now J. H. Williams, Petitioner in the above-entitled action, and says:

That in the record and proceedings of the Supreme Court of the State of Kansas in said cause there is manifest error, and said Petitioner makes the following Assignments of Error:

I.

The Supreme Court of Kansas erred in holding that Chapter 250 of the Laws of the State of Kansas of 1907, entitled "An Act to

protect mines, miners and mine laborers, and defining the manner of sale and delivery of black powder for use in coal mines of the State of Kansas, under the provisions of which Act said Petitioner was arrested and imprisoned, was not in contravention of the Fourteenth Amendment of the Constitution of the United States.

II.

The Supreme Court of the State of Kansas erred in holding that said Chapter 250 of the Laws of Kansas of 1907, was not in contravention of Article 1 of Section 8 of the Constitution of the United States, which declares that "The Congress shall have power to regulate the commerce among the several States," in that said Act prohibited the sale of black powder for use in any coal mine in the State of Kansas otherwise than in original packages containing neither more nor less than twelve and one-half pounds of
82 such powder; the black powder sold by said Petitioner and for which he was arrested and imprisoned being enclosed in an original unbroken package containing twenty-five pounds of such powder, which original and unbroken package was imported into the State of Kansas from the State of Missouri by the Central Coal and Coke Company, of which Company said Petitioner was the agent and representative in selling and delivering such original and unbroken package of powder; said package of black powder having been for many years put up by the manufacturers thereof and sold and transported among the several States of the Union in original packages containing twenty-five pounds of such powder.

III.

The Supreme Court of the State of Kansas erred in holding that your Petitioner is in custody not in violation of the Constitution of the United States.

IV.

The Supreme Court of the State of Kansas erred in refusing to discharge your Petitioner from arrest for the violation of said Chapter 250 of the Laws of the State of Kansas of 1907, and in remanding your Petitioner to the custody of the jailer of Crawford County, State of Kansas.

Wherefore, your Petitioner respectfully prays that a Writ of Error may be issued out of this Court, directed to the Supreme Court of the State of Kansas, commanding said Court to serve and send to this Court a full and complete transcript of the records of all proceedings in said Supreme Court of the State of Kansas in said case, wherein your Petitioner is the Petitioner thereof; and that your Petitioner may have such other and further relief and remedy in the premises as to this Court may seem appropriate, and that said

judgment of said Supreme Court of the State of Kansas in
83 said cause and every part thereof may be reversed by this Honorable Court.

And your Petitioner will ever pray.

J. H. WILLIAMS,
By D. B. HOLMES &
CHAS. BLOOD SMITH,
His Att'ys.

84 [Endorsed:] No. —. U. S. Supreme Court. In re J. H. Williams. Assignment of Errors. Filed Jun- 5, 1909. D. A. Valentine, Clerk Supreme Court. Rossington & Smith, Rooms No. 18, 20, 22, 23 and 24, Crawford Building, Topeka, Kanssa, Attorneys for Petitioner.

85 The United States of America to the Attorney General of the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at Washington, D. C., within thirty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of Kansas, wherein J. H. Williams is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. A. Johnston, Chief Justice of the Supreme Court of Kansas, this 5th day of June, in the year of our Lord one thousand nine hundred and nine.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

I accept service of the above this 5th day of June, A. D. 1909.

F. S. JACKSON,
Attorney General of the State of Kansas.

86 [Endorsed:] No. —. United States Circuit Court, First Division of the Judicial District of Kansas. Citation. Filed Jun- 5, 1909. D. A. Valentine, Clerk Supreme Court.

87 SUPREME COURT, STATE OF KANSAS, *ss:*

I, D. A. Valentine, clerk of the said court, do hereby certify that there was lodged with me as such clerk on June 5th, 1909, in the proceeding entitled, In the matter of the application of J. H. Williams for the writ of Habeas Corpus.

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for the respondent and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas, this June 9th, 1909.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

88 In the Supreme Court of the State of Kansas.

No. 16198.

In re the Application of J. H. WILLIAMS for the Writ of Habeas Corpus.

Pursuant to a Writ of Error issued out of the United States Circuit Court for the District Court of Kansas, on the 5th day of June, A. D. 1909, and directed to the Supreme Court of the State of Kansas, and in obedience to the command thereof, I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby transmit to the Supreme Court of the United States a duly certified transcript of the record and all proceedings of this Court in the within entitled cause, with all things concerning the same, together with the original Writ of Error and Citation, with acceptance of service thereof hereto attached.

Witness, my hand and the seal of the Supreme Court of Kansas hereto affixed at my office at Topeka, this 9th day of June, A. D. 1909.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 21738. Kansas Supreme Court. Term No. 258. J. H. Williams, plaintiff in error, vs. J. E. Walsh, sheriff and ex officio jailer of the county of Crawford, Kansas. Filed June 30th, 1909. File No. 21738.

13

Office Supreme Court, U. S.
FILED.
OCT 14 1911
JAMES H. McKENNEY,
CLERK.

In the Supreme Court
of the United States.

J. H. WILLIAMS, *Plaintiff in Error,*

vs.

JOHN E. WALSH, SHERIFF, AND *ex officio* JAILER, OF THE COUNTY OF CRAWFORD, KANSAS, *Defendant in Error.*

No. 79.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

D. B. HOLMES,
CHAS. BLOOD SMITH,
Attorneys for Plaintiff in Error.

HOLMES, HOLMES & PAGE,
Of Counsel for Plaintiff in Error.

CRANE & CO., TOPEKA

In the Supreme Court
of the United States.

J. H. WILLIAMS, *Plaintiff in Error,*
vs.
JOHN E. WALSH, SHERIFF, AND *ex officio* JAILER, OF THE COUNTY OF CRAWFORD, KANSAS, *Defendant in Error.*
No. 21,738.

ON WRIT OF ERROR TO SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

J. H. WILLIAMS, the plaintiff in error, was convicted before a Justice of the Peace for the city of Pittsburg, Crawford county, Kansas, upon the charge of having sold, in said county, on the 3rd day of June, 1908, in violation of the law of the State of Kansas, to one John Thomas, a coal miner employed in shaft 17 of the Central Coal and Coke Company, a certain quantity of black powder to be used in said coal mines situated in Crawford county, said black powder not being in an original package containing twelve and one-half pounds, securely sealed, and there being at that time no existing

contract for the sale of said black powder to be used in said mine.

The prosecution was based upon the statute of the State of Kansas, approved March 5th, 1907, which took effect May 27, 1907, Chapter 250, Laws of Kansas, 1907, entitled:

"AN ACT to protect mines, miners and mine laborers, and defining the manner of sale and delivery of black powder for use in coal mines of the State of Kansas."

By that statute it is provided as follows:

"SECTION 1. It shall be unlawful for any individual, firm or corporation to sell, offer for sale or deliver for use at any coal mine or mines in the State of Kansas, black powder in any manner except in original packages containing twelve and one-half pounds of powder, said package to be securely sealed; said powder to be delivered by the company to the miner at its powder-house, not more than three hundred feet from pit-head, unless hereafter otherwise provided by contract; provided, however, *this act shall not be construed as in any manner conflicting with any existing contract of sale of black powder.*

"SEC. 2. It shall be unlawful for any miner, mine laborer or other person in any mine or mines to open any original package of powder in any manner other than unsealing the seal thereof.

"SEC. 3. It shall be unlawful for any miner, mine laborer or other person or persons to take, convey, or cause to be taken or conveyed, into any mine or mines in the State of Kansas, black powder in any other

manner except as provided in Section 1 of this act. It shall be unlawful for any miner, mine laborer or other person to use any pick or other metal substance or instrument in opening any can containing powder in the mine; provided, that any can filled with powder so received and opened by any miner or other person shall be returned, complete, when emptied, at the miner's working switch, to the company furnishing the same, before such miner or other person shall receive another can of powder.

"SEC. 4. No powder shall be delivered by hauling the same in any car hauled by an electric motor, unless the car in which the powder is hauled for delivery is thoroughly insulated.

"SEC. 5. Any person or corporation or officers or employees of any corporation violating any of the provisions of sections 1 and 4 of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be fined not exceeding fifty dollars for each offense.

"SEC. 6. Any miner, mine laborer or other person who shall violate the provisions of Sections 2 and 3 of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be fined not exceeding ten dollars for each offense.

"SEC. 7. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

"SEC. 8. This act shall take effect and be in force from and after its publication in the statute book."

The case was tried before the Justice of the Peace upon the following stipulation:

"It is stipulated in the above entitled case, that in

the county of Crawford and State of Kansas, on the 3rd day of June, A. D. 1908, the defendant in this case did sell and deliver to John Thomas in said county and State, a coal miner, employed in shaft number seventeen (17) of the Central Coal and Coke Company, within said county and State, a certain quantity of black powder to be used in said coal mine, situated in said county and State, said black powder then and there not being in an original package, containing twelve and one-half pounds, securely sealed, and that then and there, there was not an existing contract for the sale of black powder, to be used in said mine.

"It is further agreed that said sale and delivery was made in the usual course of business, and the said John Thomas presented himself voluntarily to buy the same, and that the same was sold as above stated, in the usual and ordinary course of business.

"The defendant contends that chapter 250 of the Laws of Kansas of 1907, under which the arrest in this case is made, is unconstitutional and void, as violative of section one of the Bill of Rights of the State of Kansas, and also void because it is the violation of section one, article fourteen (14) of the amendments to the Constitution of the United States.

"In testimony whereof, we have hereunto subscribed our names, this 6th day of June, 1908.

MORRIS CLIGGETT,
Attorney for Defendant.

W. J. TRUE,
Ass't Prosecuting Att'y,
Crawford Co. Kan."

The defendant was found guilty of the offense

charged. The court adjudged that he pay a fine of fifty dollars and costs of prosecution, and on default thereof stand committed to the jail of Crawford county, Kansas, until the fine was paid. Such default having occurred, a writ of commitment was issued and delivered to the defendant in error, and defendant was incarcerated in the jail of Crawford county, Kansas.

He sued out a writ of *habeas corpus* from the Supreme Court of the State of Kansas, upon the ground that he was restrained of his liberty in violation of the Constitutions of the United States and of the State of Kansas.

In his petition for the writ, and the amendment thereto, the plaintiff in error set forth as follows:

"Said complaint, judgment and commitment are founded solely on Chapter 250 of the Laws of Kansas of 1907, entitled 'An Act to protect mines, miners and mine laborers, and defining the manner of sale and delivery of black powder for use in coal mines of the State of Kansas,' and that said Justice of the Peace had no jurisdiction to render said judgment and issue such commitment, except such as is conferred by said Chapter 250 of said Laws of Kansas, which said Chapter 250 of said laws is null and void because the same is in conflict with the Fourteenth Amendment to the Constitution of the United States and with the Constitution of the State of Kansas, in the following particulars:

"1. Said Chapter 250 interferes with and restricts the right of private contract with reference to the sale

of black powder in contravention of said Fourteenth Amendment to the Constitution of the State of Kansas.

"2. Said Chapter 250 discriminates unlawfully against persons buying or selling black powder to be used in any coal mine in the State of Kansas by restricting the sale thereof otherwise than in original packages containing twelve and one-half pounds of powder, whereas, all other persons selling black powder in the State of Kansas for use elsewhere than in a coal mine are permitted to sell the same in packages of any kind or character, and in quantities of any size, all in contravention of said Fourteenth Amendment to the Constitution of the United States and of the Constitution of the State of Kansas.

"3. Said Chapter 250 is also in contravention of said Fourteenth Amendment to the Constitution of the United States and of the Constitution of the State of Kansas, in that it makes the vendor of black powder other than in original packages containing twelve and one-half pounds, which the purchaser intends to use in a coal mine in the State of Kansas, guilty of a criminal offense whether the vendor of such black powder knows of the intention of the purchaser thereof to so use the same or not, whereby said Chapter 250 has the effect of abridging the privileges and immunities of citizens of the United States and to deny persons within the jurisdiction of the State of Kansas the equal protection of the laws.

"4. Said Chapter 250 also constitutes a discrimination against vendors of black powder for use in coal mines otherwise than in original packages containing twelve and one-half pounds of powder, in that it makes it a criminal offense, punishable by fine, for such vendor to sell such powder, but does not make it any offense

whatsoever for the purchaser of such powder to buy the same, and that, too, even though the vendor may not be aware of the intention of such purchaser to use such powder in a coal mine in the State of Kansas.

"5. Said Chapter 250 is also in contravention of said Fourteenth Amendment to the Constitution of the United States and of the Constitution of the State of Kansas in that it discriminates between vendors of black powder, otherwise than in packages containing twelve and one-half pounds, to be used in coal mines in the State of Kansas, who have a contract for the sale of black powder to be so used in other size packages in existence at the time said Chapter 250 became a law, than such vendors who are not possessed of such a contract.

"6. Said Chapter 250 is also in conflict with said Fourteenth Amendment to the Constitution of the United States and with the Constitution of the State of Kansas, in that it imposes a fine of not exceeding fifty ($50) dollars against any person violating said act by the sale of black powder for use in a coal mine in the State of Kansas, and imposes a different fine, to wit, not exceeding ten ($10) dollars upon any person who shall violate the provisions of said act, by taking powder into any coal mine in the State of Kansas in any manner other than in an original package containing twelve and one-half pounds of black powder."

"The black powder sold and delivered by your petitioner to the said John Thomas was enclosed in an original and unbroken package, containing twenty-five pounds of such powder, which original and unbroken package was imported into the State of Kansas from the State of Missouri by the Central Coal & Coke

Company, of which company your petitioner was the agent and representative in selling and delivering such original and unbroken package of powder, and your petitioner avers that black powder is, and for many years has been, put up by manufacturers thereof and sold and transported among the several States of the Union, in original packages containing twenty-five (25) pounds of such powder, and said Chapter 250 is in contravention of article 1 of section 8 of the Constitution of the United States, which declares that 'the Congress shall have power to regulate commerce among the several States,' in that said act prohibits the sale of black powder for use in any coal mine in the State of Kansas otherwise than in original packages containing neither more nor less than twelve and one-half (12½) pounds of such powder. Black powder is an article of commerce among the several States, and there is no difference in effect between the power to prohibit the sale thereof, otherwise than in twelve and one-half (12½) pound packages, as aforesaid, and the power to prohibit its introduction into the country otherwise than in packages containing twelve and one-half (12½) pounds, as aforesaid. And your petitioner further states that black powder in original packages of twelve and one-half (12½) pounds each cannot be bought or sold for in the market except at a considerably higher price per pound of such powder than the same powder can be bought or sold for in the market in original packages of twenty-five (25) pounds each, and that such powder has heretofore been customarily bought and sold in original packages of twenty-five (25) pounds each."

Record, pages 4 and 5, and 13 and 14.

The same facts were set forth by the plaintiff in error in answer to the return made by the Sheriff.

Pages 17, 18, 19 and 20 of Record.

And the allegations of fact were admitted to be true upon the hearing of the case in the Supreme Court of the State, as set forth in stipulation of attorney for respondent as follows:

"It is admitted by the respondent that the allegations set forth in the foregoing answer are true, but it is not admitted that any facts or allegations were proven in the trial before the Justice of the Peace save and except such as are set forth in the stipulation entered into between the attorneys upon the trial of the original action before the Justice of the Peace."

Record, page 20.

The case was heard before the Supreme Court of the State of Kansas, and it was adjudged that the plaintiff in error be remanded to the custody of the Sheriff of Crawford county, Kansas, and there to remain pending any other proceedings concerning him, the opinion of the Supreme Court of Kansas being that the statute was not in violation of the Constitution or laws of the United States or of the State of Kansas, and consequently the petitioner was not illegally restrained of his liberty.

79 Kan. 212.

The present writ of error brings up that judgment for review.

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of Kansas erred in holding that Chapter 250 of the Laws of the State of Kansas of 1907, entitled "An Act to protect mines, miners and "mine laborers, and defining the manner of sale and "delivery of black powder for use in coal mines of the "State of Kansas," under the provisions of which act said petitioner was arrested and imprisoned, was not in contravention of the Fourteenth Amendment of the Constitution of the United States.

II.

The Supreme Court of the State of Kansas erred in holding that said Chapter 250 of the Laws of Kansas of 1907 was not in contravention of Article 1 of Section 8 of the Constitution of the United States, which declares that "The Congress shall have power to regulate the commerce among the several States," in that said Act prohibited the sale of black powder for use in any coal mine in the State of Kansas otherwise than in original packages containing neither more nor less than twelve and one-half pounds of such powder; the black powder sold by said petitioner, and for which he was arrested and imprisoned, being enclosed in an original unbroken package containing twenty-five pounds of

such powder, which original and unbroken package was imported into the State of Kansas from the State of Missouri by the Central Coal and Coke Company, of which said company said petitioner was the agent and representative in selling and delivering such original and unbroken package of powder; said package of black powder having been for many years put up by the manufacturers thereof and sold and transported among the several States of the Union in original packages containing twenty-five pounds of such powder.

III.

The Supreme Court of the State of Kansas erred in holding that your petitioner is in custody not in violation of the Constitution of the United States.

IV.

The Supreme Court of the State of Kansas erred in refusing to discharge your petitioner from arrest for the violation of said Chapter 250 of the Laws of the State of Kansas of 1907, and in remanding your petitioner to the custody of the jailer of Crawford county, State of Kansas.

BRIEF.

I.

THE ACT IS REPUGNANT TO THE CLAUSE OF THE FOURTEENTH AMENDMENT WHICH PROHIBITS A STATE DENYING TO ANY CITIZEN THE EQUAL PROTECTION OF THE LAWS.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

Magoun v. Illinois, 170 U. S. 283.

Cotting v. Kansas City Stock Yds. Co., 183 U. S. 79.

II.

THE ACT IS IN DIRECT CONFLICT WITH SECTION EIGHT OF ARTICLE ONE OF THE CONSTITUTION OF THE UNITED STATES, WHICH DECLARES THAT CONGRESS SHALL HAVE POWER TO REGULATE COMMERCE AMONG THE SEVERAL STATES.

Brown v. Maryland, 12 Wheaton, 419.

R. R. v. Husen, 95 U. S. 465.

Minn. v. Barber, 136 U. S. 315.

Leisy v. Hardin, 135 U. S. 100.

Wilkerson v. Rahrer, 140 U. S. 545.

Sawrie v. Tennessee, 82 Fed. 615.

Schollenberger v. Penn., 171 U. S. 1.

Rhodes v. Iowa, 170 U. S. 423.

Welton v. Mo., 91 U. S. 275.

Robbins v. Shelby Taxing Dist., 120 U. S. 489.

ARGUMENT.

An analysis of the law in controversy, which became effective on the 27th day of May, 1907, by its publication in the statute book, shows:

(1) Black powder cannot be lawfully sold, and, since selling and buying are reciprocal terms, cannot be lawfully bought for use at any *coal* mine, except in securely sealed *original* packages containing twelve and one-half pounds of powder.

(2) It is made just as unlawful if the package contains only one ounce or less, as if it contains twenty-five pounds or more.

(3) The package must be *original*. This must mean a package prepared by the powder manufacturer.

(4) The transaction is only unlawful in case the powder is to be used in a *coal* mine. The same transaction is perfectly lawful if the powder is to be used in a lead or zinc mine or in any other kind of mine or for any other purpose or in any other place.

(5) It applies only to *black* powder, and not to any other kind of powder or explosive.

(6) The legislative inhibition does not apply when

the powder is sold or delivered otherwise than in such packages *in performance of a contract existing* at the time the statute took effect, so that it is or was unlawful for *some* persons to make such sales or deliveries of powder while *others* are and were guilty of a crime for doing precisely the same act.

It was argued before the Supreme Court of the State that this law was subversive of the right of private contract, is special or class legislation, and that the Act violated the Bill of Rights in the State Constitution. It was also urged that the Act violated the Fourteenth Amendment of the Constitution of the United States, in that it denied the petitioner equal protection of the laws and unlawfully discriminated against him, and that the Act was also in conflict with the Commerce clause of the Federal Constitution.

It must be conceded that the State of Kansas, by its statutes, has clearly indicated a policy to provide for safety in the operation of coal mines as a distinct subject of legislation. It was upon that ground that its Supreme Court upheld the Act in question, notwithstanding its most extraordinary and ill-considered provisions.

We therefore assume that under the decision of *Holden v. Hardy*, 169 U. S. 366, and like cases, this court would hold the act in controversy not to be in-

valid, notwithstanding its provisions have the effect to curtail or limit the freedom of contract, unless in other respects the Act is in conflict with the Federal Constitution.

It is conceded, therefore, that the liberty of contract is not universal, and is subject to restrictions passed by the Legislature in the exercise of its powers to protect the safety, health and welfare of the people, provided, that such legislation is not in conflict with the provisions of the Federal Constitution.

We admit that the Kansas Legislature had the right to determine that the local conditions in the State required that black powder should not be sold and delivered for use in any coal mines in the State except in packages containing exactly twelve and one-half pounds, no more nor less; that precisely that amount of powder was required to be sold to protect the miners that are employed in the coal mines of the State, and that the mere fact that courts or judges may differ as to the wisdom of such legislation would afford no ground for judicial interference, unless the question was in excess of legislative power.

This being a suit wherein is drawn in question the validity of an authority exercised under a State statute on the ground that the statute and the authority exercised are, in operation and effect, repugnant to the Con-

stitution of the United States, and the decision of the State court being in favor of the validity of the statute and of the authority exercised and against the plaintiff in error, this court is not concluded by the decision of the Supreme Court of the State of Kansas, but may re-examine upon the writ of error herein. To the rule that this court is bound by the decisions of the highest court of the State there are many exceptions, viz.: Where the State enactment is alleged to be in violation of the contract laws of the Federal Constitution; where it is alleged that the enforcement of the State enactment would deprive the complainant of his property without due process of law, or deny to him the equal protection of the laws; where the State enactment is claimed to be an attempt to invade the Federal domain under the guise of exercise of police power; and where it is alleged that the enactment is an attempt to regulate commerce among the States. In these cases the court will examine and determine for itself whether the enactment does violate the Federal Constitution or invade the Federal domain. The cases are numerous in this court. *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150; *Atchison, Topeka & Santa Fe Ry. v. Matthews*, 174 U. S. 96. In the former case the State court was reversed and in the latter case sustained by this court. Indeed, in the

latter case this court, in commenting upon the former, said (pp. 100, 101):

"It may be suggested that this line of argument leads to the conclusion that a statute of one State whose purpose is declared by its Supreme Court to be a matter of police regulation will be upheld by this court as not in conflict with the Federal Constitution, while a statute of another State, precisely similar in its terms, will be adjudged in conflict with that Constitution if the Supreme Court of that State interprets its purpose and scope as entirely outside police regulation. But this by no means follows. This court is not concluded by the opinion of the Supreme Court of the State. *Yick Wo v. Hopkins*, 118 U. S. 356, 366. It forms its own independent judgment as to the scope and purpose of a statute, while of course leaning to any interpretation which has been placed upon it by the highest court of the State. We have referred to the interpretation placed upon the respective statutes of Texas and Kansas by their highest courts, not as conclusive, but as an interpretation towards which we ought to lean, and which, in fact, commends itself to our judgment."

In *Morgan's Steamship Company v. Louisiana*, 118 U. S. 455, the court said (p. 462):

"In all cases of this kind it has been repeatedly held that, when the question is raised whether the State statute is a just exercise of State power or is intended by roundabout means to invade the domain of Federal

authority, this court will look into the operation and effect of the statute to discern its purpose."

Also, *Schollenberger v. Pa.*, 171 U. S. 1.
Collins v. N. H., id. 30.
Railroad v. Husen, 95 U. S. 465, 473–4.
Chy Lung v. Freeman, 92 U. S. 275.
Yick Wo v. Hopkins, supra.

In the Yick Wo case this court held that an "erroneous view of the ordinances led the Supreme Court "of California into the further error of holding that "they were justified by the decisions of this court," etc.

Notwithstanding the conceded powers of the State Legislature to enact laws of this character under the guise of police power of the State, there is, nevertheless, a limitation to such power, and we think that the law in question is in direct conflict with the Federal Constitution in two respects.

It is repugnant to the clause of the Fourteenth Amendment which prohibits a State denying to any citizen the equal protection of the laws.

It is also in direct conflict with Section 8 of Article 1 of the Constitution of the United States, which declares that Congress shall have power to regulate the commerce among the several States.

I.

THE ACT DENIES TO A CITIZEN EQUAL PROTECTION OF THE LAWS.

The exception contained in Section 1 of the Act, in our judgment, renders the Act fatally defective.

Section 1 of the Act provides that "*this Act shall not "be construed as in any manner conflicting with any "existing contract for delivery of black powder.*"

The Act thus recognizes the fact at the time it took effect, May 27, 1907, of the existence of contracts for the delivery of black powder for use in coal mines otherwise than in original packages containing twelve and one-half pounds of powder securely sealed, and discriminates in favor of that class of merchant coal operators and mine workers as against all other merchant coal operators and mine workers. It is thus made unlawful for some persons to sell or buy black powder otherwise than in twelve and one-half pounds in original sealed packages, while others may lawfully do the same thing.

It would seem unnecessary to elaborate the contention on this point, especially in view of the fact that distinctions of this character have been held to be unconstitutional by this court in many decisions. The anti-trust law of the State of Illinois was held to be unconstitutional and void as class legislation, in *Connolly*

v. Union Sewer Pipe Co., 184 U. S. 540, because of the provision contained therein that "this Act *shall not "apply to agricultural products or live-stock while in the "hands of the producer or raiser.*" We quote from the opinion in that case:

"Looking specially at its provisions, it will be seen that, so far as the statute is concerned, two or more agriculturalists or two or more live-stock raisers may, in respect of their products or live-stock in hand, combine their capital, skill, or acts for the purpose of creating or carrying out restrictions in the sale of such products or live-stock; or limiting, increasing, or reducing their price; or preventing competition in their sale or purchase; or fixing a standard or figure whereby the price thereof to the public may be controlled; or making contracts whereby they would become bound not to sell or dispose of such agricultural products or live-stock below a common standard figure or card or list price; or establishing the price of such products or stock in hand, so as to preclude free and unrestricted competition among themselves or others; or by agreeing to pool, combine or unite any interest they may have in connection with the sale or transportation of their products or live-stock that the price might be affected. All this, so far as the statute is concerned, may be done by agriculturalists or live-stock raisers in Illinois without subjecting them to the fine imposed by the statute. But exactly the same things, if done by two or more persons, firms, corporations, or associations of persons who shall have combined their capital, skill, or acts, in respect of their property, mer-

chandise, or commodities held for sale or exchange, is made by the statute a public offense, and every principal, manager, director, agent, servant, or employé knowingly carrying out the purposes, stipulations, and orders of such combination is punishable by a fine of not less than $2,000 nor more than $5,000. Is not this such discrimination against those engaged in business (other than the sale of agricultural products and live-stock in the hands of producers and raisers) as is forbidden by that clause of the 14th Amendment which declares that 'no State shall . . . deny to any person within its jurisdiction the equal protection of the laws'? . . . Under that statute all except producers of agricultural commodities and raisers of live-stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live-stock raisers, in respect of their products or live-stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides, notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturalists and raisers of live-stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is of right open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.

"The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public

objects. For this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

In order to stand the test of the Constitution which guarantees to all persons the equal protection of the laws, the principle on which classification for legislative purposes is made must bear some reasonable relation to the object to be attained by the particular legislation. It is plainly manifest that if the purpose of this Act be to promote the public health, safety and welfare, it would be no less promotive by being applicable to the size packages in which black powder might be sold or delivered *under a contract or not under a contract* existing on May 27, 1907.

With two employers, side by side, and doing precisely the same thing, delivering black powder, the one having such a contract and the other not, the latter is classed by this Act as a criminal, while the former is certified to be an upright and law-abiding man. As

might well be expected, the decisions of this court lend no countenance to such a claim.

That legislation of this character cannot be sustained as coming within the police power of the State, is firmly established by abundant authorities of this court, as well as by numerous authorities of the courts of the respective States.

The Supreme Court of the State cited the opinion of this court which was rendered in *Magoun v. Illinois Trust & Savings Company*, 170 U. S. 283, as a decision sustaining the right of the legislature to make classification, and that a law that operated only upon a class was not invalid if the classification was reasonable.

In this same opinion, however, this court, on page 293, says:

"The clause of the Fourteenth Amendment especially invoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.' *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337. It does not prohibit legislation which is limited, either in the objects which it is directed or by the territory within which it is to operate. It merely requires that all persons sub-

jected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed."

There is a plain attempt at an arbitrary, unjust and unreasonable discrimination and classification by the Legislature in the application of the Act in controversy. Wherever this occurs, such legislation has been held, by this court, to be repugnant to the Federal Constitution.

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, the charges by stock yards companies were made to depend upon the amount of business done. Yet in that celebrated case, which is directly in point here, this court through Mr. Justice BREWER lays bare the illegality, if not the absurdity, of classification on such a basis, in the following words:

"But it is not necessary to rest our decision upon this consideration, which was not fully discussed by counsel, but pass to a question which is of a kindred nature, and in which there is presented no matter of the doubtful construction of statute.

"The Act in terms applies only to those stock yards within the State, 'which for the preceding twelve months shall have an average daily receipt of not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep.'

"If the average daily receipts of a stock yard are more than 100 head of cattle, or more than 300 head of

hogs, or more than 300 head of sheep, it comes within the purview of this statute. If less than that amount, it is free from legislative restriction. No matter what yards it may touch today in the near or far future, the express declaration of the statute is that stock yards doing a business in excess of a certain amount of stock shall be subjected to this regulation, and that all others doing less business shall be free from its provisions. Clearly the classification is based solely on the amount of business done, and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this: requiring a railroad company hauling ten tons of freight a day to charge only a certain sum per ton, leaving to other railroad companies having a less amount of freight the right to make any reasonable charge; or, one requiring a railroad company hauling 100 or more passengers a day to charge only a specified amount per mile for each, leaving those hauling 99 or less to make any charge which would be reasonable for the services; or, if we may indulge in the supposition that the legislature has a right to interfere with the freedom of private contracts, one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or forbidding farmers selling more than ten bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but

simply on the amount of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down.

"The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice Catron, of this court, when in *Vanzant v. Waddel*, 2 Yerg. 262, 270, he said:

" 'Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.'

"The 14th Amendment forbids any State to 'deny to any person within its jurisdiction the equal protection of the laws.' The scope of this prohibition has been frequently considered by this court.

"In *Gulf, C. & S. F. Co. v. Ellis*, 165 U. S. 150, 159, in which was presented solely the question of classification, he said, referring to many cases, both State and national:

" 'But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews

speaking for this court, in *Yick Wo. v. Hopkins*, 118 U. S. 356, 369: "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.'"

At another place in the opinion, the learned justice uses the following language, every word of which is pertinent to the Act now being discussed:

"There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head

of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its *indirect* results affects different individuals or corporations differently, nor with those in which a classification is based upon *inherent* differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the *quantity* of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

The criminality or innocence of an act done ought not to depend upon the fact whether such act was done under a contract or not under a contract existing at the time of the taking effect of the law. Equal protection of the laws means equal exemptions with others of the same class from all charges and burdens of every kind.

II.

THE ACT IN CONTROVERSY IS VOID BECAUSE IT REGULATES INTERSTATE COMMERCE AND IS IN CONFLICT WITH THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The facts set up in the answer and admitted by stipulation to be true, disclose that the package of powder sold by the petitioner in this case as agent of the Central Coal & Coke Company was an original package containing 25 pounds of black powder imported for sale by the Central Coal & Coke Company from the State of Missouri into the State of Kansas.

It is true that these particular facts were not put in evidence before the Justice of the Peace, but we do not regard the circumstance as material in this case. This court will take judicial notice of the matter of common knowledge that black powder is a subject of interstate commerce.

This court has the power to hold that the Act is void in its entirety if it be void so far as it attempts to regulate interstate commerce. While statutes may be void in part and valid in part, yet they are always held to be void *in toto* if void in part where it is clear to the court from an inspection of the law itself that the legislature would not have enacted the law at all with the void portion eliminated and the other left to stand. It is inconceivable that the Legislature of the State of

Kansas would have enacted a statute which provided in terms that it should be unlawful to sell black powder manufactured in the State of Kansas otherwise than in original sealed packages containing no more and no less than twelve and one-half pounds, but that it should be lawful for any person to sell black powder in original packages of any size or character, provided the same were imported into the State from some other State. It must be remembered that under the agreed statement of facts, which also is a matter of which this court will take judicial knowledge, black powder, like all other articles of merchandise, sells in the market for a less price per pound in larger than in smaller packages.

Our position, therefore, is that in point of fact, it is immaterial whether the package sold by the plaintiff in error was an original imported package or not, for the reason that this court should hold the Act void in its entirety if it shall agree with us in the contention that the Act is void as applicable to importations of black powder from another State. If void in its entirety, as a matter of course the plaintiff in error should be discharged.

The words "original packages" contained in Section 1 of the Act in controversy had a technical meaning well known to the members of the Kansas Legislature at the time of the passage of the Act.

As has been well said by this court in its opinion in *Rhodes v. Iowa*, 170 U. S. 423:

"The words 'original packages' had at the time of the passage of the act by the decision of this court, acquired, with reference to the construction of the Constitution, a technical meaning signifying that the merchandise in such packages was entitled to be sold within the State by the receiver thereof, although said laws might forbid the sale of merchandise of like character not in such packages."

It therefore clearly appears that the Act in controversy is an attempt to regulate and control, not only the importation of an article of commerce, but also the sale of such article in its original package.

The Act, by its very terms, prevents the importation into the State of Kansas of black powder to be used in the coal mines in said State, except in original packages containing twelve and one-half pounds of powder. It is quite impossible to conceive of a more rigid regulation of an article of importation than is disclosed by the provision of this Act. It not only prescribes the size of the package to be imported, but prevents a merchant or dealer from importing black powder to be used in the coal mines of the State in any other than a twelve-and-one-half-pound package, as a denial of a right to sell an original package in any other size than that containing twelve and one-half pounds is, in effect,

a prohibition against the importation of any other package, either larger or smaller than the one containing twelve and one-half pounds.

The act most effectually precludes the merchant coal operator from importing and purchasing his powder in wholesale in larger packages, so as to obtain a more reasonable rate, and then putting up the same in securely sealed packages containing the amount specified in the Act.

It is submitted that this is not only an arbitrary and unreasonable discrimination against the merchant coal operator dealing in black powder and selling the same for use to coal mines and all other merchants dealing in the same article and selling the same for use in any other pursuit who may buy and import black powder in packages in any desirable size and seal the same in any sized package that they see fit, but it is also a direct prohibition against the merchant coal operator from importing into the State black powder other than in original packages containing twelve and one-half pounds.

To our minds it appears that whenever the Kansas Legislature attempted to legislate in regard to the sale of an original package of black powder or any other article of commerce, such legislation was not only an

attempt to regulate commerce but was a most effectual regulation thereof.

In the early case of *Brown v. Maryland*, 12 Wheat. 419, MARSHALL, C. J., in delivering the opinion for this court, said (pp. 447–448):

"What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the States is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? Not, how far will it be probably abused? The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

"We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable."

In *Railroad Company v. Husen*, 95 U. S. 465, the court had under consideration a statute of Missouri, prohibit-

ing under penalties, any Texas, Mexican or Indian cattle from being driven or otherwise conveyed into or remaining in any county of the State during certain portions of the year. It was held in the syllabus that:

"While a State may enact sanitary laws and for the purpose of self-protection establish quarantine and reasonable inspection regulations and prevent persons and animals having contagious or infectious diseases from entering the State, it cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory.

"Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers conferred by the Constitution upon Congress."

Mr. Justice STRONG, delivering the opinion, said that a State may not "under the cover of exercising "its police powers substantially prohibit or burden "either foreign or interstate commerce."

In the case of *Minnesota v. Barber*, 136 U. S. 315, a statute providing for inspection before slaughtering of cattle, sheep and swine was held to be unconstitutional and void so far as it required such inspection in that State before sales of fresh meat could be lawfully made in Minnesota. In answer to the argument that the statute was not unconstitutional for the reason that it did not discriminate against the product or business of

other States, or impose a burden upon interstate commerce, the court said (p. 326):

"To this we answer, that a statute may, upon its face, apply equally to the people of all the States and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute. (*Robbins v. Shelby Taxing District*, 120 U. S. 489, 497; case of *State Freight Tax*, 15 Wall. 232.) The people of Minnesota have as much right to protection against the enactments of that State, interfering with the freedom of commerce among the States, as have the people of other States. Although this statute is not avowedly, or in terms, directed against the bringing into Minnesota of the products of other States, its necessary effect is to burden or obstruct commerce with other States, as involved in the transportation into that State, for purposes of sale there, of all fresh beef, veal, mutton, lamb or pork, however free from disease may have been the animals from which it was taken."

In the case of *Leisy v. Hardin*, 135 U. S. 100, the Iowa prohibitory act was held invalid so far as it applied to a sale by an importer of liquor while in the original package, as repugnant to the commerce clause of the Constitution. FULLER Chief Justice, delivering the opinion of the court, said (pp. 108–109):

"And while by virtue of its jurisdiction over persons

and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject-matter which has been confined exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by Congressional action. (*Henderson v. Mayor of New York*, 92 U. S. 259; *Railroad Co. v. Husen*, 95 U. S. 465; *Walling v. Michigan*, 116 U. S. 466; *Robbins v. Shelby Taxing District*, 120 U. S. 489.) The power to regulate commerce among the States is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws and laws in relation to bridges, ferries and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the General Government. Where the subject-matter requires a uniform system as between the States, and power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States; but where, in relation to the subject-matter, different rules may be suitable for different

localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the General Government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. (*Cooley v. Wardens of Philadelphia*, 12 How. 299.)"

(On pp. 109, 110):

"Whenever, however, a particular power of the General Government is one which must necessarily be exercised by it, and Congress remains silent, this is not only a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the General Government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammeled. (*County of Mobile v. Kimball*, 102 U. S. 691; *Brown v. Houston*, 114 U. S. 622; *Wabash, St. Louis etc. Railway v. Illinois*, 118 U. S. 557; *Robbins v. Shelby Taxing District*, 120 U. S. 489, 493.)"

(On pp. 112, 113):

" 'If in the present case,' said Mr. Justice Matthews,

'the law of Iowa operated upon all merchandise sought to be brought from another State into its limits, there could be no doubt that it would be a regulation of commerce among the States,' and he concludes that this must be so, though it applied only to one class of articles of a particular kind. The legislation of Congress on the subject of inter-state commerce by means of railroads, designed to remove trammels upon transportation between different States, and upon the subject of the transportation of passengers and merchandise."

(On p. 119):

"The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end."

(On pp. 122, 123):

"These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the National Government; but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity, or its dispo-

sition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the General Government, and is therefore void."

The case of *Wilkerson v. Rahrer*, 140 U. S. 545, involved the constitutionality of the prohibition law of Kansas after the enactment by Congress of the so-called Wilson Act. In the opinion it is said (pp. 555, 556):

"The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States. (*Robbins v. Shelby Taxing District*, 120 U. S. 489.) And if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy, and that of the laws passed in pursuance thereof. (*Gibbons v. Ogden*, 9 Wheat. 210.) That which is not supreme must yield to that which is supreme. (*Brown v. Maryland*, 12 Wheat. 448.)"

(On pp. 559, 560):

"The laws of Iowa under consideration in *Bowman v. Railway Company*, 125 U. S. 465, and *Leisy v. Hardin*, 135 U. S. 100, were enacted in the exercise of the police power of the State, and not at all as regulations of commerce with foreign nations and among the States, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one State and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence, it was held that inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress did not pass any law to regulate it specifically, or in such way as to allow the laws of the State to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammeled, and therefore that the laws of Iowa, referred to, were inoperative, in so far as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the State, or their sale upon arrival, in the form in which they were imported there from a foreign country or another State."

In the case of *Sawrie v. Tennessee*, 82 Fed. 615, a Tennessee statute prohibiting the importation or sale of cigarettes was held invalid as in contravention of the interstate commerce clause so far as it had application to cigarettes brought into the State and sold in the

original packages. Mr. Justice LURTON, then on the Circuit, after a consideration, in the opinion, of the liquor legislation and the decisions of the Supreme Court with reference thereto, said (pp. 620, 621):

"So in this case it must be recognized that the cigarette is equally a well-known subject of barter, sale, trade and commerce, so recognized in all the channels of commerce, and by the laws of Congress which prescribe the original package for purposes of taxation. The question here, as in the Whisky case, just cited, is: Whether, being an article of commerce, can the State of Tennessee, in the absence of legislation by Congress, prohibit their importation from a sister State? Or, when imported, prohibit their sale by the importer? No important distinction can be drawn between this case and *Leisy v. Hardin*. If all that can be said touching the evil consequences of the use of the cigarette upon the health and morals of the State be admitted, much more can be said, and was said, of the evils sought to be guarded against by the Iowa prohibition statute. If the traffic in ardent spirits is a recognized and legitimate subject of commerce, so is the traffic in the cigarette. If Congress has recognized the fact that the one is an article of traffic and commerce, by prescribing an original package and imposing a tax thereon, so it has recognized the other. A distinction is sought to be drawn by the State's counsel between the case at bar and *Leisy v. Hardin*, in that the Tennessee statute absolutely prohibits all commerce in the cigarette for any purpose whatever, while the Iowa statute under consideration in *Leisy v. Hardin*, recognized ardent spirits, wine, beer, and ale

as objects of commerce by permitting their sale by license of the State for mechanical, medicinal and sacramental purposes. The argument based on this difference is that under the police power a State may prohibit all traffic in a given article, which in the judgment of the legislature is deleterious to the health or morals of its people, and that the power of Congress to regulate commerce among the States can have no application in respect to an article when its commercial qualities have been destroyed by an exercise of the police power. This argument was met by Justice Catron in the License Cases, 5 How. 599, *et seq.:*

" 'If this be the true construction of the constitutional provision,' said Justice Catron, 'then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress and leaves with the States the power to determine the commodities or articles of property which are the subject of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be the subjects of commerce and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted

by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drunk, or to food and clothing, and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands."

(On p. 622):

"If the State enactment regulating traffic in a particular article be in fact a quarantine or an inspection statute, and, as such, is aimed at something uncommercial, by reason of its state or condition, such as articles infected, or disguised so as to be a cheat calculated to lead a purchaser into buying something he did not intend to buy, as in *Plumley v. Massachusetts*, 155 U. S. 461, the enactment may be upheld as an exercise of the police power of the States, and not a regulation of commerce. But this Tennessee statute, in so far as it prevents importation and sales in the original package by the importer, is not a quarantine or inspection statute, and is not based upon the state or condition of the cigarette."

This court, in the case of *Schollenberger v. Pennsylvania*, 171 U. S. 1, in reversing the decision of the Supreme Court of Pennsylvania, decided that the oleomargarine statute of that State was unconstitutional so far as it prevents a sale in the original package by the importer or his agent.

In holding that the right existed under the commerce clause of the Constitution to sell the imported commodity direct to the consumer, the following language is used in the opinion (pp. 24, 25):

"We are not aware of any such distinction as is attempted to be drawn by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer. How small may be an original package it is not necessary to here determine. We do say that a sale of a ten-pound package of oleomargarine, manufactured, packed, marketed, imported and sold under the circumstances set forth in detail in the special verdict, was a valid sale, although to a person who was himself a consumer. We do not say or intimate that the right of sale extended beyond the first sale by the importer after its arrival within the State. (*Waring v. The Mayor*, 8 Wall. 110, 122.) The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless, for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different States in the Union. Having the right to sell through his agent, a sale thus effected is valid.

"The right of an importer to sell cannot be depended upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumer or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the State

to use such means as may be necessary to prevent the introduction of an adulterated article and for that purpose to inspect and test the article introduced, provided the State law does really inspect and does not substantially prohibit the introduction of the pure article and thereby interfere with interstate commerce. It cannot for the purpose of preventing the introduction of an impure or adulterated article absolutely prohibit the introduction of that which is pure and wholesome. The act of the Legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another State and its sale in the original package, as described in the special verdict, is invalid."

The power of Congress to regulate commerce between the States being supreme, its failure to impose any restrictions or regulations is to be taken as a declaration that in its judgment such commerce shall be free. It alone has power to restrict or prescribe regulations, and its failure to do so leaves the commerce untrammeled. This is a settled rule of constitutional law.

This court in *Welton v. Mo.*, 91 U. S. 275, says:

"The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on the subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled."

Again, this court in *Robbins v. Shelby Taxing District*, 120 U. S. 489–493, says:

"Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons v. Ogden*, 9 Wheat. 1, 222; by Mr. Justice Grier in *The Passenger Cases*, 7 How. 284, 462; and has been affirmed in subsequent cases. *State Freight Tax Cases*, 15 Wall. 232, 279; *Railroad Co. v. Husen*, 95 U. S. 465, 469; *Welton v. Missouri*, 91 U. S. 275, 282; *Mobile v. Kimball*, 102 U. S. 691, 697; *Brown v. Houston* 114 U. S. 622, 631; *Walling v. Michigan*, 116 U. S. 446, 455; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Wabash &c. Ry. Co. v. Illinois*, 118 U. S. 557."

Congress has not legislated on the subject of black powder, as it has on the transportation of passengers and merchandise and with reference to the transportation of nitro-glycerine, which does not include black powder.

All of which is respectfully submitted.

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Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

J. H. WILLIAMS, *Plaintiff in error,*
vs.
JOHN E. WALSH, Sheriff and *ex officio* Jailer of the County of Crawford, Kansas, *Defendant in error.*

No. 21,738.

On writ of error to the Supreme Court of the State of Kansas.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT.

The history of this case, in brief, is as follows: On May 27, 1907, chapter 250 of the Laws of 1907 of Kansas went into effect, being the act copied in full upon pages 2 and 3 of the brief of plaintiff in error. That act was for the protection of mines, miners and mine laborers. Section 1 made it unlawful for any person to sell for use at any coal mine in the State of Kansas black powder in any manner except in original packages containing twelve and one-half pounds of powder, the package to be securely sealed; and contained the proviso that this act should not be construed as in any manner conflicting with any existing contract of sale of black powder.

Section 2 made it unlawful for any person to open any original package of powder in any manner other than unsealing the seal thereof.

Section 3 made it unlawful for any person to carry into any mine in the State of Kansas black powder in any other way than as provided in section 1, and further made it unlawful for any person to use any pick or any other metal substance in opening any can containing powder in the mine, and required that any can opened should be returned, when emptied, at the miner's switch before the person requesting it should be permitted to receive another can of powder.

Section 4 prohibited hauling the same in electric car unless the car be insulated.

Section 5 provided that any person convicted of violation of section 1 or section 4 should be fined not exceeding fifty dollars.

Section 6 provided that any person violating section 2 or section 3 should be fined not exceeding ten dollars.

On June 6, 1908, the plaintiff in error was arrested, charged with having offered for sale and with having sold and delivered to a coal miner employed in a mine a certain quantity of black powder to be used in the mine, the said black powder not being in an original package containing twelve and one-half pounds securely sealed, and there being no existing contract for the sale of black powder at the time.

The case was tried before a justice of the peace upon an agreed statement of facts, which is shown upon page 9 of the printed transcript, and which stipulates that the plaintiff in error did, in the county of Crawford and State of Kansas, on the 3d day of June, 1908, sell and deliver to John Thomas, a coal miner employed in a mine in said county, a certain quantity of black powder, to be used in said mine situated in said county, said black powder not being in an original package containing twelve and one-half pounds securely sealed, and that there was not an existing contract at that time for the sale of black powder to be used in said mine. The defendant introduced no evidence, but claimed that said chapter 250 was unconstitutional as in violation of section 1 of the Bill of Rights of Kansas, and of section 1,

article 14 of the amendments to the Constitution of the United States.

The case was tried before the court without a jury, and after argument the justice of the peace found the defendant guilty as charged in the complaint, and ordered that he pay a fine to the State of Kansas in the sum of fifty dollars and costs, and stand committed until the fine and costs be paid.

Defendant did not appeal to the district court, although the law of Kansas provides for such appeal, but filed his petition for a writ of habeas corpus in the supreme court of Kansas. The supreme court of Kansas denied the petition, the decision being reported at page 212 of volume 79 of the Supreme Court Reports of the State of Kansas, and is copied in full in the printed transcript, beginning at page 26.

We believe the opinion of the supreme court of Kansas in this case very fully and satisfactorily presents the law and correctly determines the matters in controversy, but wish to remind the court of the following facts:

1. The plaintiff was charged and tried before a justice of the peace, a court of competent jurisdiction, with selling black powder contrary to the laws of Kansas.

2. No suggestion was made in any of the proceedings in that case that the powder sold was an article of interstate commerce.

3. The defendant (plaintiff herein) made no claim before the justice of the peace that the powder sold was an original package or imported from another state, or that defendant represented a citizen of another state in selling the powder, or that the powder was not in fact an article of purely domestic trade.

4. The only defense made in the justice court was that the law was in violation of section 1 of the Bill of Rights of Kansas and of section 1 of the fourteenth amendment to the Constitution of the State of Kansas.

The only defense, therefore, made in the justice court was that defendant was denied the equal protection of

the laws; and we believe it is now too late to set up the other defense that the powder was an article of interstate commerce, and that therefore the defendant was not subject to prosecution.

I.

THE PETITIONER WAS NOT DENIED THE EQUAL PROTECTION OF THE LAWS.

We do not know the purpose of the Legislature in adding the proviso to section 1, which reads:

"This act shall not be construed as in any manner conflicting with any existing contract for delivery of black powder."

We are not sure that we really know the meaning of this clause. The use of the words "conflicting with" should be noted, and we believe that a strict construction of this proviso would lead to the conclusion that it has really no force whatever, and therefore does not abridge the operation of the statute and should be given no consideration whatever. If, however, the word *affecting* were substituted for "conflicting with," then it would be reasonable to say that the Legislature had expressed its intention that then existing contracts for the delivery of black powder should not be affected by the act; and that if any person had, before the law went into effect, made a contract which bound him to deliver certain powder, he might still deliver that certain powder without becoming liable to the penalty of the law by reason thereof.

If this be the correct interpretation of the proviso, it certainly does not constitute such class legislation as to "deny to any person the equal protection of the law." It applies to all persons similarly situated. It covers every sale and delivery made upon any contract entered into after the law took effect. It applies to every person engaging in making any such sale or delivery. It simply does not count as a violation of the law the completion of a contract to deliver made prior to the

passage of the law. It does forbid all similar sales and deliveries upon all contracts made by all persons after the law took effect, whether such persons had their contracts or not, or whether such persons had horses and cattle or not.

All persons similarly situated (in the respect that they are, since the law took effect, selling or delivering black powder for use in coal mines in other than twelve-and-one-half-pound sealed packages) are subject to the same penalty under the law in question.

All packages of black powder (similarly situated in the respect that they are sold or delivered for use in coal mines, and not in original packages containing twelve and one-half pounds, securely sealed) are equally subject to the operation of this law.

This law, therefore, clearly operates on all persons similarly situated and upon all property similarly situated. Consequently, it cannot be said that any person is denied equal protection under this law.

We cite a few of the many decisions of this court upon this particular point:

Warts v. Hoagland, 114 U. S. 615.

Duncan v. State of Missouri, 152 U. S. 382.

Eldridge v. Trezvant, 160 U. S. 469.

Lowe v. State of Kansas, 163 U. S. 88.

Under the light of these decisions, the case of Connolly v. Union Sewer Pipe Co., 184 U. S. 540, cited on page 20 of plaintiff's brief, is seen to have no application to the facts in this case. Neither do we think the case now before the court is within the decisions of the court in the other cases cited by counsel.

Counsel for plaintiff in error, we understand, admit that the use of powder in coal mines is a proper subject of police regulation. We quote from page 15 of their brief as follows:

"We admit that the Kansas Legislature had the right to determine that the local conditions in the State required that black powder should not be sold and delivered for use in any coal mines in the State, except

in packages containing exactly twelve and one-half pounds, no more nor less; that precisely that amount of powder was required to be sold to protect the miners that are employed in the coal mines of the State, and the mere fact that courts or judges may differ as to the wisdom of such legislation would afford no ground for judicial interference unless the question was in excess of Legislative power."

Certainly black powder is a substance of such nature that its careless handling under any circumstances is attended with serious danger, and this is particularly so in a coal mine where work is done in darkness and where some artificial lights are required, where electric wires are subject to being broken, and where explosions and accidents are liable to occur, and the regulation of the conduct of persons in coal mines is a matter of very great importance for the safety of all persons connected with the mines. The exercise of the police power of the State of Kansas by virtue of the act in question applies not only to the use of black powder, but also, and more intimately and directly, to the conduct and management of coal mines, and we believe that the courts have clearly and sufficiently accorded to the Legislatures the right, under the police power retained by them, to regulate both the subject of the handling of black powder and of carrying on the business of mining for coal.

In the case of Foster v. Kansas, 112 U. S. 206, this court uses the following language:

"It has, nevertheless, with marked distinctness and uniformity recognized the necessity, growing out of the fundamental conditions of civil society, of upholding State police regulations which were enacted in good faith and had appropriate and direct connection with that protection to life, health and property which each State owes to its citizens."

In the case of Consolidated Coal Co. v. Illinois, 22 Sup. Ct. Rep. 617, this court further said:

"The regulations of mines and miners, their hours of labor, and the precautions that shall be taken to insure

heir safety, health and comfort, are so obviously within the police power of the several States that no citation of authorities is necessary to vindicate the general principle."

In Leisy v. Hardin, 10 Sup. Ct. Rep. 691, the court said:

"The police power extends not only to things intrinsically dangerous to the public health, such as infected rags or diseased meat, but to things which when used in a lawful manner are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the life, the health or the morals of the people. Gunpowder, for instance, is an article of commerce and of lawful use, yet because of its explosive and dangerous quality all admit that the state may regulate its keeping and sale."

And, on page 695, the court refers to the power of a city to exclude gunpowder. The careless or negligent keeping of gunpowder in large quantities near buildings, or where the lives of persons are thereby endangered, is a nuisance at common law.

We believe that the question as to the extent of regulation should be determined by the Legislature, and so far as the Legislature has acted reasonably in its regulation, its laws should be clearly upheld.

In the case of Jamison v. United States Gas Co., 12 L. R. A. 652, Chief Justice ELLIOTT uses this language:

"As the regulation prescribed by the statute is not one of commercial interests or property rights, and as there is nothing in the complaint indicating a purpose to oppress or destroy, we cannot, nor can any court, presume that there was any other purpose than the just one of regulating the use of essentially dangerous property for the good of the community. As there is power to regulate the use of property, the measure of regulation must, to a very great extent, be within the discretion of the Legislature."

II.

THE ACT IN CONTROVERSY IS NOT VOID FOR THE REASON THAT IT REGULATES INTERSTATE COMMERCE AND IS IN CONFLICT WITH THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

We do not think, as we have stated above in this brief, that this question is properly before the court, for the reason that is was not raised in the justice court and no facts were proved before the justice to show that the defendant had any standing to claim in his own behalf the right to invoke the protection of the fourteenth amendment to the Constitution of the United States. He was simply charged with selling black powder in manner prohibited by the law of Kansas. He made no defense that the powder that he was charged with selling was an article or interstate commerce, and he was convicted simply of the offense charged. If he in fact were a citizen of another State, and if the black powder that he sold were shipped from another State, and was by him sold as an agent of a corporation of another State, and in the original package, and if that would have been a defense to him, he should have established those facts in his defense before the justice court. He did not do so. He even then had a right to appeal, and upon appeal in the district court he would have had the right to introduce any competent evidence in his behalf, and he neglected to take such appeal and neglected to make such defense. We believe that it was his duty to make that defense at the proper time in the trial of the case. Section 6295 of the General Statutes of Kansas of 1909 reads as follows:

"§ 6295. *What not to be inquired into.* No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:

* * * * * * * *

"Second, upon any process issued on and final judgment of a court of competent jurisdiction."

See, also, *Ex parte* Nye, 8 Kan. 99, from which we quote the following:

"It appears by the petition that the applicant is in custody by virtue of process issued on a final judgment of a court of competent jurisdiction; and this fact precludes an inquiry into the legality of the judgment or process by which he is imprisoned, and would prevent this court from discharging him from custody."

Under the law of Kansas justices of the peace have original jurisdiction in cases of misdemeanor. The black-powder act makes the violation thereof a misdemeanor. The justice of the peace, therefore, had jurisdiction of the question.

Unless the black-powder act is upon its face absolutely void, and void even as relating to offenses committed entirely within the State and in which no question of interstate commerce is concerned, then clearly the supreme court of Kansas had no jurisdiction, under section 8 of article 1 of the Constitution of the United States, to review the evidence before the justice of the peace or to release the defendant upon the ground that additional evidence, if it had been introduced, would have resulted in his acquittal.

Ex parte Watkins, 2 Peters, 193.

Abelman v. Booth, 21 Howard, 506.

Duncan v. State of Missouri, 152 U. S. 382.

"Errors and irregularities which do not render the proceedings void are not ground for relief by habeas corpus."

Franklin v. Westfall, 27 Kan. 618.

"The court will not listen to an objection made to the constitutionality of an act by a party whose rights it does no affect and who has therefore no interest in defeating it."

Cooley on Constitutional Limitations (7th ed.), p. 232.

The defendant in this case did not show to the justice of the peace that he was so dealing in black powder as to entitle him to the protection of the interstate commerce clause of the federal Constitution. He allowed

the justice of the peace to render his decision upon the belief that he was a resident of Kansas and was selling an article of simply domestic trade.

We do not find that anywhere, either in justice court or in the supreme court of Kansas, has the plaintiff in error established, by any proof or by any stipulation, the fact that he was a resident of another State than Kansas, or that the black powder that he admits having sold was shipped from another State as an article of interstate commerce. On page 29 of plaintiff's brief occurs this language:

"The facts set up in the answer and admitted by stipulation to be true disclose that the package of powder sold by the petitioner in this case, as agent of the Central Coal and Coke Company, was an original package containing twenty-five pounds of black powder, imported for sale by the Central Coal and Coke Company from the State of Missouri into the State of Kansas."

We have examined carefully the transcript of the record in this case, and do not find any stipulation such as is claimed to have been made, neither do we find that anywhere the fact was established such as is claimed in the above statement. It is true that an amendment to the petition for the writ of habeas corpus, as found on page 13 of the printed transcript, alleges that the black powder was imported and that the petitioner was agent and the representative in selling the powder. But we do not find that any evidence in support of that allegation was presented to the supreme court of the State of Kansas, or that the matter was established by any agreement in the case.

We think that the decisions of this court and of the supreme courts of Kansas and of Iowa in reference to the intoxicating liquor laws of those two states are to some extent analogous to this case. In 1881 the prohibitory liquor law of Kansas went into effect, and that law was general in its nature. It did not in any terms make mention of original packages or of interstate commerce, but prohibited generally the sale or intoxicat-

ing liquors excepting for medicinal, mechanical and scientific purposes, and prohibited the sale even for those purposes excepting by druggists under certain very strict regulations. The law has been clearly and definitely held to be not in violation of any of the provisions of the Constitution, but when articles of interstate commerce were shipped into the State containing intoxicating liquors, then the question arose as to whether or not those could be absolutely prohibited. But in any such case the proof had to be made that the defendant in the action was in position to claim the benefit of the interstate commerce clause of the federal Constitution, and no suggestion was ever entertained that he could claim immunity from the penalty of the statute without showing that he himself was so situated that the interstate commerce clause applied to him and to his act.

On page 31 of his brief the plaintiff in error quotes from Rhodes v. Iowa, 170 U. S. 423, to show the technical meaning of the words "original package." We do not think that the mere fact that the black-powder law of Kansas refers to an original package should be construed as meaning that the law applies to packages which are a subject of interstate commerce only. Certainly that was not the intention of the Legislature. The intention of the Legislature appears to us to have been to so regulate the introduction of powder into the coal mines as to enable those having charge of the mines to keep an absolute check upon all powder that went in, so that at no time would there be any danger that powder might be lying around promiscuously in dangerous places, and for this purpose the word "original package" was probably used to indicate the package in which the powder was sold originally to be used in the mine, with the seal unbroken, so as to be easily subject to inspection. The provision which specifies that when such package is opened the seal be broken, and that before a miner can receive additional powder he should return the package with the broken seal, seems to

throw light upon the use by the Legislature of the words "original package."

The chief purpose of this law is to make coal mining as safe an occupation as can reasonably be expected, and that is the direct and primary, and probably exclusive, purpose of the law. The purpose is not to regulate the handling of black powder as a trade or business or as a matter of commerce. It is simply to make coal mining safe. One of the dangers of coal mining is the use of explosives, and this law simply deals with the use of explosives in the coal mines, for the protection of the mines and persons within them, and not for the purpose of regulating the dealing in the explosives. Laws regulating saloons and the conduct of saloons, persons who are allowed to be employed in them, the locations of the saloons, what is allowed to be sold in them, and all such matters, are proper subjects of police regulation, because saloons, if allowed to be run without regulation, are dangerous; and coal mines have been found very dangerous and destructive to human life when not properly regulated and supervised. The State of Kansas considers this black-powder law one of very great importance to the State and to thousands of miners who are daily working under the ground in the coal mines, and it believes that it has a right to so regulate the conduct of all persons within those mines, or the property that goes into those mines, so as to make them as safe as can reasonably be expected without interfering with the proper management of the mines.

This brief is respectfully submitted, this 8th day of December, 1911.

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